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No. 84-1258 (16)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

CHEMICAL BANK AND WASHINGTON PUBLIC POWER SUPPLY SYSTEM,

Petitioners,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF BENTON COUNTY, WASHINGTON, et al.,

Respondents.

BRIEF OF RATEPAYER INTERVENORS IN OPPOSITION TO PETITION FOR CERTIORARI

Michael W. Gendler*
BRICKLIN & GENDLER
900 Fourth & Pike Bldg.
Seattle, Washington 98101
(206) 621-8868

William H. Rodgers, Jr.
School of Law, Condon Hall
University of Washington
Seattle, Washington 98105
(206) 543-5182

Counsel for Respondents
Ratepayer Intervenors

*Counsel of Record

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QUESTION ADDRESSED

Whether this Court should undertake to review federal questions neither raised nor presented until after the challenged decision was made by the Washington Supreme Court.

PARTIES TO THE PROCEEDINGS

Petitioner Chemical Bank's list of parties to the proceedings (petition at iii - v) omitted numerous ratepayer groups and individuals that intervened as defendants in the proceedings below: Clark County PUD Owners Association; Rollie Wulff; Ed Klump; Pacific County Irate Ratepayers; Leon Lead; Betty Kaskinen; Bill Shanahan; Burke Long; John Gillanders; Bill Gillanders; Gordon Rosier; Louise Saluteen; Concerned Ratepayers of the Tri-Cities; Robert Henry; Larry Caldwell; Matt J. P. Dillon; and Fair Use of Snohomish

Energy (FUSE). This Brief in Opposition is submitted on behalf of these intervenors (hereafter "Ratepayer Intervenors").[1]

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[1]Another group of numerous ratepayers within the service area of respondent City of Ellensburg also intervened below as defendants, represented by their own counsel.

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STATEMENT OF THE CASE

The Ratepayer Intervenors comprise individuals and groups within the service areas of seven of the respondent utilities.[2] One of these utilities, P.U.D. No. 1 of Snohomish County, was the largest single participant in WNP 4 and 5, having subscribed to more than 13 percent of the project capability.

While Petitioner and numerous amici stray far from the record to speculate (and perhaps exaggerate) about the consequences of default to the bondholders, they studiously ignore the severe consequences that would be inflicted upon the

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[2]These are: Public Utility District No. 1 of Clark County; Public Utility District No. 2 of Pacific County; Public Utility District No. 3 of Mason County; Public Utility District No. 1 of Klickitat County; Public Utility District No. 1 of Snohomish County; Public Utility No. 1 of Benton County; Public Utility District No. 1 of Franklin County.

ratepayers of Washington and the Northwest, if Chemical Bank's claims are upheld. Ignored also is Chemical's effort to shift these burdens from the bondholders, including the numerous corporations and affluent individuals who purchased the bonds voluntarily and continue to engage in speculation trading on them even to this day, to ratepayers who never were afforded a choice of investment in a project undertaken in violation of their own state law.

While the identities of the bondholders and the alleged severity of consequences to them can only be guessed at,[3]

[3] See Petition at 8-9 & n.5. See also Brief Amicus Curiae of the American Association of Retired Persons at 2-3. While Chemical acknowledges that because the bonds are bearer bonds and therefore "precise information concerning the number of bondholders, their identity, the amount of their holdings, and the like, is unavailable," petition at 8 n.5, it nevertheless offers its own "estimates" on these points without citation to the source of these "estimates."

the severe impact of the alleged obligation to ratepayers who never opted for the projects and who will obtain no electricity or other benefit from them is readily seen. Using official data setting forth each participant's share of the alleged debt and the number of ratepayers served by that participant, the Ratepayer Intervenors calculated that each of the 7,637 ratepayers served by P.U.D. No. 1 of Klickitat County would be required to pay $9,034. Similarly, the 142,751 ratepayers served by P.U.D. No. 1 of Snohomish County in 1980 would be required to pay an average of $6,430 <u>each</u> to retire an alleged debt of 918 million dollars. The average debt per ratepayer in the other service areas affecting these intervenors ranges from $3,995 (for each of the 17,019 ratepayers of P.U.D. No. 3 of Mason County) to

$8,688 (for each one of 79,764 ratepayers of P.U.D. No. 1 of Clark County).[4]

ARGUMENT

There Is No Substantial Federal Question

While emphasizing the amount of money at issue and its personal vendetta against the Washington Supreme Court, Chemical Bank conveniently overlooks its own role in bringing about a final judgment that invokes no substantial federal question. Chemical filed this action in King County superior court,[5] seeking no relief other

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[4]This data was set forth in the Memorandum in Support of Motion of [Ratepayer Intervenors] for Leave to Intervene, at 3-5 (filed Sep. 3, 1982). Neither Chemical Bank nor any other party ever challenged these data throughout the litigation.

[5]In view of Petitioner's unprecedented and vehement ad hominem attack against the Washington Supreme Court, it bears emphasis that Chemical chose that forum from a wide choice of fora available to it, including any of numerous federal district courts (based on diversity jurisdiction) and the state courts of Oregon, Idaho, and Wyoming.

than a declaratory judgment. The issues raised in support of the declaration of liability were based exclusively on state law, as were the defenses urged by the several utilities said to be liable.

The only parties raising federal questions, in the pleadings or otherwise, were the Ratepayer Intervenors who contended that the application of the hell-or-high-water clauses (described to this Court as "unconditional 'dry hole' commitments")[6] worked a denial of procedural and substantive due process upon ratepayers confronting astronomical rate increases (up to nine thousand dollars per person) to cover the project failures.[7]

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[6]Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of Salomon Brothers Inc., et al., at 3.

[7]Answer of Intervenors at 3 (Affirm. def. ¶ 5) (filed Sep. 3, 1982). The Ratepayers also advanced several state law theories

(Cont. on p. 6)

Having lost in the forum of its choosing on the theories it preferred, Chemical reargued all the basic state law issues in its Motion for Reconsideration, briefly mentioning "impairment of contract" and "due process" on pages 43 and 44 just before the "Conclusion." This was enough to draw a cryptic "no taking occurred" on the last of some fifty pages devoted to the dispute by the Washington Supreme Court. Chemical Bank v. WPPSS, 102 Wn.2d 874, 912 (1984). It is this cursory allusion to federal law that is said to substantiate the propriety of this Court rushing to intervene at the prelim-

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7 (Cont. from p. 5)

in opposition to Chemical's claims, asserting that "the participants did not have lawful authority to enter into the agreements," id. ¶ 6, and that the agreements were "void and unenforceable because they are unconscionable." Id. ¶ 7.

inary stages of what promises to be decades of litigation.

Petitioner freely concedes that it did not raise the constitutional question until after the Washington Supreme Court's first decision rejecting Chemical's state law claims. Petition at 10. Chemical belatedly has argued its taking claim, but to this date never has sought leave to amend its complaint to define and present the issue now claimed to be dispositive. Usually such belated argument is insufficient to invoke this Court's jurisdiction. See, e.g., Jones v. Hildebrant, 432 U.S. 183 (1977).

Indeed, it now is obvious that it was Chemical's strategy from the start to present only its state law claims in this declaratory judgment action. When those claims failed, Chemical filed a massive

complaint in federal court raising federal securities claims and other federal issues; it is clear that this action was not a last minute desperation effort in the wake of an "unexpected" decision by the Washington Supreme Court, as Chemical asks this Court now to believe. Instead, it now appears that Chemical has had second thoughts about the wisdom of its original strategy, and asks this Court to rescue it from its failure to plead its case properly below.,

To support its effort to have the Court overlook the untimeliness of the constitutional claim, Chemical advances the fiction that it was the Washington Supreme Court that "took" the bondholders' property by rendering a decision so "unexpected" as to deprive the bondholders of their reasonable, investment-backed

expectation. See, e.g., Petition at 4, 9-10, 14, 22.

The decision perhaps was unexpected to Chemical, because Chemical apparently neglected to read the answers and briefs of the Participants (and these Ratepayers) contending that the contracts were unauthorized (see footnote 7, supra), as well as the numerous authorities cited by the Washington Supreme Court for the well settled proposition that unauthorized, ultra vires acts by government entities are null and void. Indeed, the proposition itself is hardly novel; a plethora of cases (admittedly involving lesser sums) recognize that it is essential for the protection of an unsuspecting public to prevent the execution of unauthorized contracts, regardless of the equitable theories invoked to evade this basic principle.

In an extensive and thorough discussion, 102 Wn.2d at 900-12, the Washington Supreme Court recognized that allowing equitable relief would nullify the public protection afforded by the ultra vires rule, by allowing equity to accomplish what otherwise could not be done (i.e., the execution of unauthorized contracts).[8]

Chemical's effort to excuse its failure to plead constitutional claims by attacking the Washington court's decision is so transparent that not even its amici have adopted it. Instead, they recognize that the true essence of any constitutional claim is against the project's

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[8] Chemical emphasizes that everyone ("participants, their counsel, and independent bond counsel") asserted that authority existed, Petition at 20-21, a point emphasized by the Washington Supreme Court as well. 102 Wn.2d at 899. These assertions are grist for the mill of Chemical's securities suit, where ultra vires and other state law defenses presumably will not bar recovery.

participants. See Motion for Leave etc. of Salomon Brothers, et al., supra at 1 (repudiation by Washington utilities "effected an uncompensated taking"); id. at 7; id. at 12 ("the actions of the Participants ratified by the Washington Supreme Court give rise to a 'taking' in the present case"). When properly cast in this manner, it becomes clear that the decision of the court, no matter how unexpected, does not excuse Chemical's failure to plead and argue ab initio that the alleged repudiation by the participants was a taking. Particularly where a massive securities lawsuit is well underway toward resolving the claims of misrepresentation and fraud that are the essence of Chemical's grievance, this Court should decline the invitation to address a claim of constitutional error invited by the Petitioner's own litigation strategy.

No Taking Has Occurred

This Court has pointed out that any analysis of the Taking Clause requires an "essentially ad hoc, factual" inquiry. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). On more than one occasion this Court has declined to be drawn into the resolution of takings claims on records more instructive than the present one. Agins v. Tiburon, 447 U.S. 255, 260 (1980); see Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 294-97 (1981); Hodel v. Indiana, 452 U.S. 314, 334-35 (1981).

This Court stated in Hodel v. Virginia Surface Mining & Reclamation Ass'n, supra at 295:

> These "ad hoc, factual inquiries" must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances.

But these critical factual elements are lacking here. There is no identification of the "specific property" alleged to be taken; "estimates of economic impact" are spun out of whole cloth by Chemical for the first time in its Petition for Certiorari, id. at 8-9 & n.5, and without citation to the source of the estimates (even one outside the record); and there is no evidence regarding the "ultimate valuation" of bonds that continue to be the subject of active trade.[9]

A trial on a taking theory properly presented could have focused on the nature

[9] See also Andrus v. Allard, 444 U.S. 51, 64-65 n.21 (1979) ("The timing of acquisition of the artifacts is relevant to a takings analysis of appellees' investment-backed expectations. . ."). The record does not indicate, nor has Chemical stated, how many bondholders acquired their interest after this litigation began and after the Washington Supreme Court's decision. Nor is there information regarding the amounts already paid as interest to bondholders, the current purchase price of the bonds, or their current fair market value.

of the claimed property right and its asserted impairment. That this did not occur is the result of Chemical deliberately bypassing the federal theories it must assert to gain this Court's attention.

It is of course indispensable to the success of a takings claim that the property said to be the subject of the divestiture be clearly specified. See Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., supra at 295. The bondholders still have the tangible manifestations of their investment, bonds which to this day remain the objects of active trade and negotiation. See Andrus v. Allard, 444 U.S. 51, 65-67 (1979) ("In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds." Held: no taking,

despite recognition that Act prevented most profitable use of property).

It appears from the submissions that the "property" said to be taken is the "unconditional 'dry hole' commitment" received as the security. See, e.g., Petition at 16. But as this Court repeatedly has recognized:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972), quoted with approval in Texaco, Inc. v. Short, 454 U.S. 516, 525 (1982).

It is clear that states have considerable discretion to define protected "property" and to adjust remedies in the face of claims of clear economic loss.

Texaco, Inc. v. Short, supra at 526, 528-33; Memphis Light, Gas & Water Division v. Craft, 437 U.S. 1 (1978). See also Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) (sustaining over constitutional objection liability limits in the Price-Anderson Act). To the ratepayers, the proposed "dry hole" entitlement is an outrageous and unconscionable imposition that can be rolled back without compensation no less than the spillover easements commonly associated with pollution law.

Petitioner and amici rely heavily on Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) to establish that interest (as well as principal) is protected property that may not be confiscated by a judicial declaration that the property never existed in the first place.

But in Webb's the property interest was defined clearly at the outset in a proceeding brought for the very purpose of addressing the taking issue. See Motion for Leave etc. of Salomon Brothers et al., supra at 11 ("The receiver thereon brought a proceeding . . ."). No clear definition of the property interest here was provided by Chemical in its belated pleas to the Washington Supreme Court.[10]

The property at issue in Webb's was

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[10] Chemical and its amici continue to have difficulty in defining the proper alleged to be taken. Is it the participants' "repeated assurances," petition at 16, the "benefit of their bargain," id., the principal invested by the bondholders, id. at 16, 18, the failure of participants to make restitution, id. at 19-21, or is it the refusal of the Washington Supreme Court to rule in accordance with the Petitioner's demands (id. at 21-22)? Or did a "chorus of State assurances" establish "reasonable investment-backed expectations" on the part of the bondholders? See Motion for Leave etc. of Salomon Brothers, et al., supra at 14 (emphasis in original).

the interest that could be earned on the funds deposited into court. This Court's decision merely recognized that the interest must be viewed as private property, state statutes and judicial pronouncements notwithstanding. 449 U.S. at 164. Here, no post hoc statute or decision has altered the nature of the bondholders' property; the court determined that there was no authority to enter the contracts on the basis of statutes in place when the unauthorized actions were taken. Here, no property was confiscated because the participants never had authority to enter into the unconditional dry-hole commitments that Chemical now asserts have been taken. Chemical's theory seems to be that any judicial rejection of a due process claim itself becomes a taking if the decision is contrary to the claimant's expectation.

CONCLUSION

This is a big case, but at this point it is not a constitutional one. Nowhere does Petitioner's invective sound more harshly than in its concluding pleas about "public morality and trust in government." Petition at 28. But this case is about state laws and ultra vires actions, not about constitutional issues Chemical deliberately bypassed throughout the proceedings below. This Court should resist the unprecedented pressures of the financial community to transform this case into something it is not and never has been, and should deny the petition for certiorari.

DATED this 5th day of April, 1985.

Respectfully submitted,

Michael W. Gendler*
BRICKLIN & GENDLER
900 Fourth & Pike Bldg.
Seattle, Washington 98101
(206) 621-8868

William H. Rodgers, Jr.
School of Law, Condon Hall
University of Washington
Seattle, Washington 98105

Counsel for Respondents
Ratepayer Intervenors

*Counsel of Record